

No. 16,001 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NEIL J. McCONLOGUE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted in the Northern District of California for alteration and uttering of a Postal Money Order on February 8, 1956. On February 9, 1956 appellant was arraigned and counsel was appointed to represent him. On February 14, 1956 appellant entered a plea of guilty to the first count of the indictment and was sentenced on March 6, 1956. Appellant was sentenced to a term of five years by the Honorable Michael J. Roche, United States District Judge for the Northern District of California. On

August 9, 1956 appellant was sentenced to a term of two years for a violation of Section 2314 of Title 18 United States Code (Interstate Transportation of Forged Checks) in the Eastern District of Michigan by United States District Judge Arthur A. Koscinski. On October 22, 1957, more than sixty days from the date of judgment in the Northern District of California case, appellant moved to vacate and set aside sentence on the grounds that the judgment and sentence of the Court did not "represent the true views of the Court." An Order to Show Cause was issued by Judge Roche on November 26, 1957 and a return to the Order to Show Cause was filed by the United States through its attorneys Lloyd H. Burke and Donald B. Constine. On February 20, 1958 Judge Roche ordered the Order to Show Cause discharged and denied appellant's motion for relief under Section 2255 of Title 28 United States Code. Appeal from the order denying relief under Section 2255 was then timely made to this Court.

QUESTION PRESENTED.

Can the Court below properly deny appellant relief under Section 2255 of Title 28 United States Code?

ARGUMENT.

I. APPELLANT APPEALED TO THE WRONG COURT.

Section 2255 of Title 28 United States Code provides a means for questioning the validity of judgments in the District where sentence is imposed. In

the instant case appellant's complaint concerns not the five year sentence imposed in the Northern District of California on March 6, 1956, but concerns the two year sentence of imprisonment imposed by the Eastern District of Michigan on August 9, 1956. His complaint seems to be that some sort of promise was made that no further action would be taken by the Michigan authorities in view of his plea of guilty and sentence in the Northern District of California.

Assuming, but not conceding, that this is the fact, no invalidity would attach to the sentence imposed in the Northern District of California. On the contrary, the proper place for appellant to complain would be in the Eastern District of Michigan where the two year sentence, which he contends should not have been imposed, was in fact given. The record, of course, does not indicate that any promise of any nature from anyone was ever given to appellant. If, however, the United States was bound by some representation allegedly made, the only action which could be taken would be to invalidate the sentence which appellant contends should never have been imposed. Appellant did not complain at the time nor does he appear to complain now of the five year sentence imposed by the Court below. His motion for relief, therefore, should have been directed to the United States District Court for the Eastern District of Michigan. Section 2255 only authorizes attack at "the Court which imposed the sentence."

With respect to the Northern District of California sentence, appellant is not claiming that "the sentence

was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum imposed by law or is otherwise subject to collateral attack.” Appellant has, therefore, brought the 2255 proceeding in the wrong jurisdiction.

II. THE COURT WAS UNDER NO MISAPPREHENSION.

Appellant’s claim in this case is based upon an alleged misapprehension on the part of the sentencing Judge. In his motion appellant claims that the judgment did not represent the “true views of the Court.” Nowhere in the records or files of the Court is there any indication that such was the case. A full transcript of the entire proceedings in this case is a part of the record on appeal. The record reflects that appellant had already entered a plea of guilty with respect to the offense in the Eastern District of Michigan, Record 21. There was, to be sure, some indication that the Michigan Court might consider the fact that sentence had been imposed in the Northern District of California. As a matter of fact that appears to be what they did, since appellant had a criminal history extending back to February 1917, five prior felony convictions, and had escaped from custody prior to sentence in the Michigan case, TR 18. The sentence, however, in the Michigan Court was only two years.

In any event, however, the Court was not concerned with what action would be taken by the Michigan

authorities. The Court expressly stated "I am not traveling to Detroit looking for work; I have plenty of it here." The Court then gave sentence of five years. Nowhere in the record is there the slightest indication that the Court intended to give any lesser term of years if the Michigan Court were to impose a sentence. As the Court strongly indicated it was impossible at the time to look into the future and determine what action would be taken in the Michigan District. The Court, therefore, imposed a sentence in accord with appellant's prior criminal history. This action would of course be taken into consideration when and if the Michigan Court had occasion to pass on appellant's case. The record simply reflects and the Court below decided that the judgment was precisely what the Court intended.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 23, 1958.

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